No. 85-1771

Supreme Court, U.S.
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In The
SUPREME COURT OF THE UNITED STATES

October Term, 1985

RICHARD D. LECOUNT,

Petitioner,

v.

BETHLEHEM STEEL CORPORATION
and
UNITED STEELWORKERS OF AMERICA, LOCAL 6787,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS,
SEVENTH CIRCUIT

BRIEF OF RESPONDENT, BETHLEHEM STEEL CORPORATION

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QUESTION PRESENTED FOR REVIEW

In an employee's action against his employer and his union, arising out of the conduct of a grievance-arbitration procedure and brought under §301 of the Labor Management Relations Act (29 U.S.C. §185), did the Court of Appeals appropriately affirm the entry of summary judgment in favor of the defendants where the employee failed to commence suit until nine months after the last possible date on which his action may have arisen?

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RELEVANT STATUTES

Section 301 of the Labor Management Relations Act states, in full:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

29 U.S.C.A. §185(a) (West 1978).

Section 10(b) of the National Labor Relations Act states, in pertinent part:

> . . . no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge . . . .

29 U.S.C.A. §160(b) (West 1973).

The Indiana Uniform Arbitration Act states, in pertinent part:

> An application under this section [to vacate an arbitration award] shall be made within ninety [90] days after the mailing of a copy of the award to the applicant, except that,

> if predicated upon corruption or fraud or other undue means, it shall be made within ninety [90] days after such grounds are known or should have been known.

Ind. Code Ann. §34-4-2-13(b) (Burns 1973).

No. 85-1771

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1985

RICHARD D. LECOUNT, Petitioner, v. BETHLEHEM STEEL CORPORATION and UNITED STEELWORKERS OF AMERICA, LOCAL UNION 6787, Respondents.	)	On Petition for a Writ of Certiorari to the United States Court of Appeals, Seventh Circuit

BRIEF OF RESPONDENT, BETHLEHEM STEEL CORPORATION

I. STATEMENT OF THE CASE

Factual Background

On June 9, 1977, Richard D. LeCount ("LeCount") was discharged from his employment with Bethlehem Steel Corporation ("Bethlehem") for excessive absenteeism in violation of the terms of a previously executed grievance settlement. Subsequently, he filed a grievance with his

union, United Steel Workers of America, Local Union 6787 ("Union").

After unsuccessfully representing him through three steps of the grievance procedure, the Union informed LeCount on March 10, 1978, that his case did not merit submission to arbitration, the last step in the grievance resolution procedure. In response, LeCount sought relief from the National Labor Relations Board ("NLRB"). The NLRB denied his complaint on September 11, 1978. Nine months later and almost two years after his discharge, LeCount filed this hybrid action against the Union and Bethlehem, his employer, for wrongful discharge and unfair representation under section 301(a) of the Labor Management Relations Act (29 U.S.C. §185(a)).

Procedural History

These proceedings began on June 6, 1979, when LeCount filed his complaint

against Bethlehem and the Union in the United States District Court for the Northern District of Indiana under Cause No. H79-291. On March 16, 1981, Bethlehem moved for summary judgment on the grounds that the complaint was untimely. After various amendments to their pleadings, the parties were ordered to brief the effect of this Court's decision in DelCostello v. International Brotherhood of Teamsters, 462 U.S. 151 (1983). Accordingly, the parties filed their respective memorandum of law, and after consideration thereof, the district court entered summary judgment in favor of the defendants. In its order, dated January 7, 1985, which is set forth in full in Appendix "C" to the Petition for Writ of Certiorari, the district court expressly followed the Seventh Circuit Court of Appeals' decision in Landahl v. PPG Industries, Inc., 746 F.2d 1312 (7th Cir. 1984), and retroactively applied the six-month limitation of action established

in DelCostello.

LeCount appealed this adverse judgment to the United States Court of Appeals for the Seventh Circuit. On January 3, 1986, the Seventh Circuit, without oral argument and in an unpublished order, affirmed the district court's dismissal of LeCount's complaint as barred by the statute of limitations.

LeCount now seeks the issuance of a writ of certiorari to review the issue twice resolved against him, most recently by the United States Court of Appeals for the Seventh Circuit.

II. SUMMARY OF ARGUMENT

Review on Writ of Certiorari is a matter of judicial discretion which should only be exercised when "special and important" reasons to do so exist. The present controversy fails to meet this

threshold of importance. First, the issue presented is an episodic problem of concern to few beyond those now before the Court. Furthermore, as time passes the problem, if any now exists, will simply fade away without judicial intervention. Second, even if LeCount were to prevail and restrict this Court's holding in DelCostello to prospective application, his claim would remain barred as untimely, since Indiana law in 1978 favored the use of a limitation period significantly shorter than that provided by DelCostello.

In addition, the retroactive application of DelCostello is governed by the general rule of retroactivity, with proper consideration for exception under the principles announced by this Court in Chevron Oil. Although LeCount claims that there exists a conflict of outcome in the application of Chevron to DelCostello, this divergence is to be expected due to the fact-sensitive nature of the Chevron

analysis. Moreover, in the present case, the Seventh Circuit Court of Appeals properly considered the factors which would permit nonretroactive application and concluded they did not justify any deviation from the general rule.

In summary, LeCount has failed to establish a meritorious reason for the exercise of this Court's power of discretionary review. Therefore, the Petition for Writ of Certiorari should be denied.

III. ARGUMENT

A. LECOUNT'S REQUEST FOR ISSUANCE OF A WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THE CONTROVERSY FAILS TO RAISE AN IMPORTANT ISSUE OF FEDERAL LAW.

1. Review by this Court is unwarranted in cases where the issues are unlikely to recur.

While review on writ of certiorari lies within the discretionary powers of this

Court, exercise of that discretion depends on the existence of "special and important reasons" for granting the writ. Rice v. Sioux City Memorial Park Cemetery, Inc., 349 U.S. 70, 73 (1955); Sup. Ct. R. 17.1. In Rice, Justice Frankfuter noted, "[t]his Court does not sit to satisfy a scholarly interest . . . . Nor does it sit for the benefit of the particular litigants. [Citations omitted] 'Special and important reasons' imply a reach to a problem beyond the academic or the episodic." Rice, 349 U.S. at 74.

The case at bar presents just such an episodic problem of importance to few beyond those now before the Court. Five years have passed since this Court announced that short periods for bringing actions in hybrid §301 cases best served the federal interest in the prompt resolution of labor disputes. United Parcel Service, Inc. v. Mitchell, 451 U.S. 56 (1981) (holding 90-day limitation on

action to vacate arbitration to be most appropriate). Few, if any, parties can claim a timely action of the type here asserted after the passage of five years. Indeed, one court, cited by LeCount for support, conceded that "[T]his problem will shortly go away, if it is not already gone, ..." Zemonick v. Consolidated Coal Co., 762 F.2d 381, 389 (4th Cir. 1985). Furthermore, the fact that the Seventh Circuit Court of Appeals disposed of the matter without oral argument and by an unpublished order provides additional evidence of this question's low precedential potential. See Petition for Writ of Certiorari, Appendix "A". Thus, the controversy fails to present issues of sufficient importance to warrant consideration by this Court.

2. Where a petitioner's requested relief would be denied even under the law as he asserts it to be, the case is not sufficiently important to justify consideration by this Court.

The gravamen of LeCount's petition is that the law as it appeared on the date he commenced this action should control. It is difficult to ascertain how that position aids him in any way. Prior to this Court's holding in DelCostello, it was generally believed that the limitation period in §301 cases was " . . . to be determined, as a matter of federal law, by reference to the appropriate state statute of limitations." UAW v. Hoosier Cardinal Corp., 383 U.S. 696, 705 (1966). While LeCount relies on Hoosier for the proposition that Indiana's six-year statute of limitations was, in 1978, generally applicable to all §301 complaints, this Court explicitly refused to decide that question. Hoosier, 383 U.S. at 705 n.7 ("Whether other §301 suits different from the present one might call for the application of other rules on timeliness, we are not required to decide, and we indicate no view whatsoever on that question.")

Rather, the choice of the most appropriate state statute was said to depend on the nature of the federal claim and the federal policies involved. Hoosier, 383 U.S. at 706-07. In Hoosier, where a union brought an action against an employer for vacation pay allegedly due under a collective bargaining agreement, this Court found the suit to be essentially one of contract and, in light of federal labor policy which favors rapid disposition of labor disputes, held the shorter of two alternative contract statutes applicable. Hoosier, 383 U.S. at 705 n.7, 707. In contrast, the present §301 case involves an individual employee who brought an action against his union and employer as a result of an alleged mishandling of a grievance-and-arbitration procedure. This type of action was characterized by this Court as hybrid in nature and closely analogous to an action to vacate an arbitration award. Hines v. Anchor Motor

Freight, Inc., 424 U.S. 554 (1976). Notably, Hines came a full three years before the initiation of this action and set the stage for a series of cases which applied the 90-day Indiana statute of limitation, Ind. Code §34-4-2-13, applicable to actions to vacate an arbitration award. Davidson v. Roadway Express, Inc., 650 F.2d 902 (7th Cir. 1981) (appeal from decision rendered by United States District Court for the Southern District of Indiana); Chauffers, Teamsters, Warehousemen and Helpers Local 135 v. Jefferson Trucking Co., 473 F. Supp. 1255 (S.D. Ind. 1979), aff'd, 628 F.2d 1023 (7th Cir. 1980) (90-day statute applied against employer claiming impropriety in grievance procedure); Hardesty v. Essex Group, Inc., 550 F. Supp. 752 (N.D. Ind. 1982).

In summary, Indiana law in 1978 favored the use of a limitation period significantly shorter than that provided by this Court in DelCostello. Thus, even if

DelCostello were to be applied prospectively, LeCount's claim remains barred as untimely. Accordingly, it does not merit consideration by this Court.

B. WHERE VARIATION IN CASE RESULTS ARE ATTRIBUTABLE TO THE PROPER APPLICATION OF A FACT-SENSITIVE LEGAL DOCTRINE, LECOUNT'S PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE RESOLUTION OF ANY APPARENT CONFLICT IS UNNECESSARY.

While the ancient dogma that the law declared by its courts is as it has always been is no longer universally accepted, retroactive application of law-altering decisions remains the general rule. See Rogers v. Lockheed-Georgia Co., 720 F.2d 1247, 1249 (11th Cir. 1983), citing National Association of Broadcasters v. FCC, 554 F.2d 1118, 1130 (D.C. Cir. 1976). To lessen the general rule's potential harshness, this Court recognized an exception which permits nonretroactive application of a newly-announced doctrine

when considerations of reliance, purpose, and equity demand it. Chevron Oil Co. v. Huson, 404 U.S. 97 (1971). The essence of the Chevron test for nonretroactivity is an examination of the litigant's reliance on the legal climate prevailing in his particular jurisdiction at the time his action accrued. Chevron, 404 U.S. at 107-09. Thus, the Chevron analysis is fact-sensitive in the sense that the degree of uniformity of law in the various jurisdictions is determinative of the degree of variation observable in retroactive application.

In the present case, which considers the retroactive application of the uniform federal six-month statute of limitation for §301 cases announced by this Court in DelCostello, it should not be surprising that variation in retroactive application exists. Prior to DelCostello, the limitations period applied to §301 cases varied greatly from state to state.

Compare Price v. Southern Pacific Transportation Co., 586 F.2d 750 (9th Cir. 1978) (applying California's three-year statute of limitation) with Chauffers, Teamsters, Warehousemen and Helpers Local 135 v. Jefferson Trucking Co., 628 F.2d 1023 (7th Cir. 1980) (affirming use of Indiana's 90-day statute for actions relating to arbitration). In fact, the Hoosier court prophesied this result and accepted it as the cost of avoiding judicial intervention. Hoosier, 383 U.S. at 701-03. (" . . . if state limitations provisions govern §301 suits, these suits will lack a uniform standard of timeliness."). Therefore, any current diversity in application is easily attributable to the lack of uniformity which existed prior to DelCostello and to the degree to which each litigant could justifiably rely on the law of his particular jurisdiction, rather than to any doctrinal conflict between the courts.

Accordingly, review by this Court to resolve the conflicts in such decisions is unnecessary.

C. WHERE THE APPELLATE COURT PROPERLY CONSIDERED THE EXCEPTION TO THE GENERAL RULE OF RETROACTIVITY, THE CASE DOES NOT WARRANT REVIEW BY THIS COURT.

As previously discussed, this Court in Chevron Oil Co. v. Huson, clarified the factors which must be established by a claimant to avoid retroactive application of an interim decision regarding the applicable statute of limitations. Chevron, 404 U.S. at 106-07. In that case, the Court enunciated three considerations which were relevant to the issue of retroactivity. Chevron, 404 U.S. at 106-07. The first mandates that before a decision may be given nonretroactive application the decision in question must have established some new principle of law either by overruling clear past precedent

or by deciding an issue of first impression whose resolution was not clearly foreshadowed. Id. On this point, the Seventh Circuit, in its consideration of the present case, concluded that 'no clear past precedent' of the kind contemplated in Chevron existed. See Petition for Writ of Certiorari at a-7 - a-9.

This conclusion gives LeCount the benefit of the doubt. Certainly, he cannot claim Hoosier to be 'clear past precedent',since, as this Court noted, its decision in Hoosier regarding the appropriate state statute to select was expressly limited to the straight contract action there involved as distinguished from the hybrid action of the type presented in the present case. DelCostello, 462 U.S. at 162. Furthermore, the Hines decision foreshadowed the position, later adopted in Mitchell and in several Indiana Federal Court decisions applying Indiana law, that the appropriate limitation period for these

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hybrid §301 cases was the 90-day limit on actions to vacate an arbitration award. See Hines, 424 U.S. at 567-71. Therefore, the Court of Appeals properly held that LeCount failed to carry his burden with regard to the first prong of the Chevron test.

Failure to meet this threshold inquiry into justifiable reliance on clear precedent is enough to defeat nonretroactive application. See Kremer v. Chemical Construction Corp., 623 F.2d 786 (2d Cir. 1980). However, examination of the remaining two Chevron factors further illustrates the correctness of the appellate court's retroactive application of DelCostello in the present case. The second consideration to be weighed under a Chevron analysis is the purpose and effect of the rule in question and whether retroactive application of the rule will further or retard its operation. Chevron, 404 U.S. at 106-07. This Court identified

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three underlying purposes for the rule announced in DelCostello: (1) to promote uniform treatment under federal labor law, (2) to provide an aggrieved employee with adequate opportunity to vindicate his rights, and (3) to promote the federal labor policy of rapid dispute resolution. See DelCostello, 462 U.S. at 168-72. In DelCostello, the Court specifically stated that the federal statute of limitation embodied in §10(b) properly balances these interests. DelCostello, 404 U.S. at 169. Thus, the second prong of Chevron favors retroactivity in this case.

The third and final consideration, like the first, turns on the particular facts of the case presented. Here, a court is directed to inquire whether substantial inequities would result from retroactive application. Chevron, 404 U.S. at 107. While LeCount claims the inequities to be obvious due to his justifiable reliance on Hoosier, his argument is fatally flawed by

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the explicit limitations placed on Hoosier by this Court. Hoosier, 383 U.S. at 705 n.7; DelCostello, 462 U.S. at 162. Moreover, as previously discussed there were, in 1978, at the commencement of this suit, strong indications that Indiana's 90-day limitation period for vacation of arbitration awards would apply. Accordingly, in Indiana, DelCostello operated to actually increase the time period within which an employee could timely file his complaint. Under these conditions, it cannot be claimed that retroactive application of DelCostello would work a substantial hardship on LeCount. See, e.g., Glover v. United Grocers, Inc., 746 F.2d 1380, 1382 (9th Cir. 1984) (retroactive application of DelCostello which lengthens time for filing does not work inequity on litigant). Indeed, LeCount concedes as much in his brief on appeal to the United States Court of Appeals for the Seventh Circuit:

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> Retroactive application of the six-month period under these circumstances, so as to enlarge the period of time during which the complaint could be filed, specifically furthers the purpose of the six-month statute of limitations period in DelCostello which was to provide an adequate time for employees to bring their claims and a period of time during which a prompt resolution of labor disputes could be effected. Certainly, such application was not prejudicial to the defendants in that case [Scott v. Local 683 International Brotherhood of Teamsters, 725 F.2d 226 (3d Cir. 1984)].

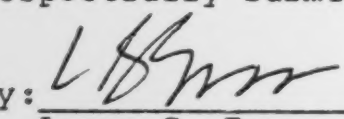
Brief for Appellant, p. 23-4. Therefore, the third prong, like the preceding two, favors retroactive application in this case.

In short, LeCount has failed to establish any of the three factors necessary for nonretroactive application. Under these conditions, the Court of Appeals was correct in concluding that this action was untimely under DelCostello. Accordingly, review by this Court is unnecessary.

IV. CONCLUSION

For all these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted

By: 

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